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File No. O. Leases /41

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Legal **DEPARTMENT**

A **BRANCH**

Subject:—

Opinions in connection with Leases.

P 18E

CONTENTS.

Legal Department File No. O.Leases /41.

Sri No.	Compilation No.	Subject	Pages.
		Opinions in connection with leases.	
1	O.No. 678/ 24-1-1941.	Lease of 7380 acres of unreclaimed and 382 acres of reclaimed area in the village Seafirst Dist. Surat- granted to Nichhabhai Narangi and others- Whether the Co. would have any cause of action against Govt. if the reclaimed land is forfieted.	1-2
2	O.No.5027 31/5/1941.	---No-----	3-4.
3	O.No.752 25/1/1941.	Whether the demand and acceptance of the rent for the year 1938-39 will in any way prejudice the right of Govt. to determine the lease if that course is found necessary.	5-6
4	O.No.2170 "/3/1941.	Whether plea raised by Mr. Khandwala that he has filed an appeal in the High Court against the decision in Belgaum C.S.No.414 of 1936 and Govt. should not terminate the lease to any other party pending the disposal of the appeals, tenable.	7-10
5	O.No.6224 17/7/41.	Breach of condition 2 of the lease by m/s Faselbhoy Ibrahim and Co. concealation of lease by the Collector.	11-12
6	R.I.No.4856 28/5/41. O.No.141-L 22/7/1941. O.No.6745 31/7/1941.	Re: Whether there would be any legal objection to amending the Building Rules and General Regulations in respect of Blocks Nos. I & II of the B.B.R. scheme.	13-18
7	O.No.8188 17/9/1941.	Whether Govt.'s rights under the lease are in any way affected by the equitable mortgage by the deposit of the deeds with Mr. Khandwalla- service of notice of forfeiture of the lease on the Eastern Mining Co	19-20
8	G.R.R.D. 5260/33 24/11/1936 Letter No.9044 17/10/1941.	Lease -- Liquor Warehouse., Jalgaon-- Renewal of	21-28
PSM. 96/4	O.No.10919 18-12-1941.	Whether the corrections can be made in the original lease so far as the terms of 'area' and 'rent' are concerned without executing a supplementary deed.	29-30

9/5

K.S.R. 9/5

Office of the R.L.A.

By Government Resolution, Revenue Department, No. L.C.3934, dated 25th May 1932, Government directed that the terms of the original lease should be modified in certain respects (pages 211-213 of R.D. File No. LC. 3934-I/1923). According to these modifications the Company was to be granted full occupancy rights over the whole of the reclaimed area while the lease was to be continued for the unreclaimed area, the annual rent being proportionately reduced. In forwarding this Government Resolution to the Collector the Commissioner directed the Collector to enquire from the Company whether it accepted the terms mentioned in the Government Resolution and to make necessary corrections in the original lease (page 215 of the same file). It is presumed that the modified terms were accepted by the Company. The Government Resolution did not direct any modification of conditions 2 and 6 of the original lease. It therefore appears that conditions 2 and 6 of the original lease continue to apply in respect of the unreclaimed area held by the Company. (See paragraph 2 of Revenue Department note at page 16 of R.D. file No. L.C.3934-II/1938 and paragraph 3 of the Collector's letter at pages 107-109 of the same file). Conditionx 2 provides that the lessees shall keep th embankments dams, etc. in good order and repairs and prevent the entrance of the sea water within the lease area. Condition 6 states that if any of the conditions is not observed by the Lessees to the satisfaction of the Collector, the Collector may cancel the remaining portion of the lease and re-enter upon the land. It is clear from the papers that embankments, dams, etc. are not now in good repair and that the Company is not able to prevent the entrance or sea water to the leased area. The Company has therefore committed a breach of condition 2 of the lease and consequently it would be legally open to the Collector to cancel the lease in respect of the unreclaimed land. The Company

would have no cause of action against Government if such action is taken by the Collector.

Sd/- P.N.M.

Remembrancer of Legal Affairs.

Sd/-

U.R. to R.D., No. 678, dated the 24th January 1941.

PSM. 25/4.

Submitted.

Attention is invited to R.L.A.'s opinion No. 678, dated 24-1-1941, in which the R.L.A. had advised that as Messrs. Fazalbhai Ibrahim and Co., had committed a breach of condition 2 of the lease, it would be legally open to the Collector to cancel the lease in respect of the unreclaimed area. As directed by H.E. the Company was informed by G.M.R.D., No. L.C.3934-B dated 26-2-1941 of Government's intention to terminate the lease in respect of the unreclaimed area. On 31-3-1041 the Company was again informed that Government proposed to take action as already decided. The R.D. now propose to direct the Collector of Surat to take steps to terminate the lease of the unreclaimed area and take its possession in accordance with the terms of the lease. The papers are shown to the R.L.A. before orders are issued accordingly to the Collector.

2. There is no legal objection to asking the Collector to terminate the lease in respect of the unreclaimed area and taking possession thereof. Both clause (6) of the original lease, dated 30-6-1915 and the agreement, dated 3-8-1922 entered into by the Company empower the Collector to cancel the remaining portion of the lease and reenter upon the land in case of failure on the part of the Company to observe the conditions attached to the lease. It is true that the le

true that lease does not require the Collector to give a notice to the lessee before he exercises the above power. It is also true that the provisions of the Transfer of Property Act, 1882, will not apply in this case. But the principle laid down in section 111(g) of that Act viz. that in case of the determination of a lease by forfeiture, it is necessary for the lessor to give notice in writing to the lessee of his intention to determine the lease will apply. Since, however, the lease of 1915 has been executed by the Collector on behalf of the Secretary of State and since Government has already informed Messrs. Fazalbhai & Co., of their intention to terminate the lease no further notice by the Collector appears necessary. The papers may therefore be seen and returned.

Sd/-
28/5.

A.S.

The case would be governed by the Crown Grants Act and no notice is necessary especially since Govt. has already communicated to the Compaby its decision in this behalf.

The papers may be seen and returned.

Sd/-
29/5

Seen and returned.

D.S

Sd/-
30/5

R.L.A. P. N. M

Sd/- 30/5

U.R. to R.D. No. 5027, dated the 31-5-1941.

PSM. 25/4

The lease granted in 1913 provides that the lessee shall pay a rent of 4 annas an acre upto September 1939. The rent was payable annually and the last instalment became due on 25th September 1939. Similarly the lessee has agreed to pay rent equal to survey assessment after that date It is also provided that if the rent has become due, and has not been paid for a period of sixty days after it has been legally demanded, the lessor may give a notice of his intention to determine the lease. The revised rent payable from 25th September 1939 is also required to be paid annually and the first such instalment has been already overdue. The rent payable for these two years has however not been demanded by Government and consequently there has so far been no breach of the conditions of the lease relating to payment of rent. There does not therefore appear to be any legal objection to demanding and accepting the rent due for the year 1938-39. The acceptance of that rent will not come in the way of Government exercising its right of determining the lease if the rent due on 25th September 1940 is demanded and is not paid for a period of sixty days thereafter.

Sd/- P.N.M.

Remembrancer of Legal Affairs.

M.R. to the R.D. , No. 762 dated the 25th January 1941.

PSM. 25/4.

Officer of the R.L.A.

It is true that as required by the Government Resolution (Revenue Department) No. 348/33, dated the 7th July 1933 the Deccan Mining Syndicate, Limited, seems to have passed a duly registered agreement in the form at page 243 of the Bombay Mines Manual and Government has since then recognised that company as the lessee. But it appears that the Deccan Mining Syndicated, Ltd. has not taken an assignment of the lease from the previous lease with the result that the title does not seem to have legally passed to it. In Regular civil suit No. 414 of 1936 filed by Mr. Khandwalla, the First Class Sub-Judge, Belgaum, has held that the title of the Deccan Mining Syndicate, Ltd. is defective for want of a proper assignment. In another suit No. 358 of 1936 both the lower court and the District Court have given a similar finding on the question of the title of the Deccan Mining Syndicate, Ltd. It appears that appeals are pending in the High Court against this finding. It is however difficult to say what view the High Court will take. Mr. Khandwalla claims to be the equitable mortgagee of the Eat Eastern Mining Co. In these circumstances it appears necessary to terminate the lease by determining the interest of <u>both</u>, viz. of the Deccan Mining Syndicate, Ltd,. as also of the Eastern Mining Co., if any. Although there is no provision in the lease for giving a notice of re-entry, such notice would be necessary (see section 111(g) of the Transfer of Property Act). Government should therefore give a notice (<u>without prejudice</u>) of forfeiture of the lease to both companies and then take possession of the leased property.

2. There is neither any privity of estate nor privity of contract between a mortgagee of the lessee's interest and the lessor (see Thathulan vs. Eralpad Raja 40 Mad. 1111). Government's rights under the lease are in no way affected by the equitable mortgage by the deposit of title deeds with Mr. Khandwalla. Government has not been made a party to the litigation between Mr. Khandwalla and others. Consequently the plea of subjudice would not be tenable and there would be no legal objection to the exercise of the right of re-entry by Government under the lease during the pendency of the litigation between Mr. Khandwalla and others.

Sd/- P. N. Moos
10/3

Remembrancer of Legal Affairs.

U.R. to R.D.,No. 2170, dated the 11th March 1941.

PSM. 25/4

Submitted.

2. Pl. see R.L.A.'s opinion No . 678, dated the 24th January 1941, in which R.L.A. advised that as Messrs. Fazalbhai Ibrahim & Co. had committed a breach of condition 2 of the lease, it would be open to the Collr. to cancel thelease in respect of the unreclaimed land and re-enter upon the said land. Before final orders were issued to the Collr. to cancel the lease, the papers were also shown to the R.L.A. for considering the question whether a notice was necessary to be issued to the lessee. The R.L.A. returned the papers with his U.R. No. 5027, dated the 31st May 1941. The Collr. passed the order of cancellation of the lease on 21st June 1941 and has forwarded a copy of his order to the R.D. The R.D. has forwarded the said copy of the Collr.'s order to th R.L.A. for remarks, if any.

3. It is stated in the order that for breach of condition 2 in the lease, the lease of the unreclaimed area is cancelled under condition 6 and the possession of the land is ordered to be taken over immediately by the Mamlatdar of Jalalpore. A copy of the lease is not among the papers now forwarded by the R.D. But the orders passed by the Collr. are in accordance with R.L.A.'s advice given in his U.R.No. 678 dated the 24th January 1941. ~~Nx~~ No further remarks area necessary. The papers may be"seen and returned."

Sd/-
8/7.

A.S.
As at'A'
Sd/-
8/7

D.S.
Sd/-
10/7

R.L.A.
Sd/-
14/7

SM. 25/4

U.R. to R.D. No. 6224 dated the 17/7/1941

L.D.'R.I.No.4856 dt. 28/8/1941.

Office of the R.L.A.

There is no legal objection to amending the Building Rules and General Estate Regulations in respect of Blocks Nos. I and II of the Back Bay Reclamation Scheme on the lines suggested in paragraph 3 of P.W.D. note at page 20 ante. It is true that Rule 3 of the said Rules and Regulations restricts the user of some of the plots to residential purposes only and that these Rules have been annexed as Schedule both to the Agreement under condition 3(c) and to the Lease under condition 2(f) of the Lease. Government has, however, expressly reserved to itself by condition 10 of the Agreement and condition 6 of the Lease the right to alter these Rules and Regulations from time to time and the conditions further provide that Lessees shall have no right to require the enforcement of any of the said Rules against Government or any person claiming under Government.

Slip u p.37

Slip u p.39

2. The case of the lease of plots in Block V referred to in paragraph 1 of P.W.D. note at page 24 ante can be distinguished on the ground that in the terms of lease for those plots there is no condition corresponding to condition No. 10 of the form of agreement and condition No. 6 of the form of the lease for plots in Blocks Nos. I and II.

3. The papers are referred to the Advocate General for advice, in view of his opinion dated 22nd July 1940.

Sd/- P.N.M
22/7

Remembrancer of Legal Affairs.

U.O. to the Adv..General, Bombay, No. 141-B, dated the 22nd July 1941.

PGH. 25/4

I agree with the view of the R.L.A.

2. I understand that what is proposed to be done is to amend the rule by adding the proviso mentioned at p. 20, and thereafter use some of the plots in Blocks 1 and 2 for the purposes of educational buildings and lease out other plots in these Blocks permitting the user of the buildings for commercial purposes.

3. The principle underlying the cases in 1905 2 Ch. 374, 9 Ch. D. 125, and 14 A.C. 12 referred to in my opinions dated the 18th of March 1940 and the 22nd of July 1940 is that a restrictive covenant given in the circumstances mentioned in those cases is deemed to be given for the benefit not only of the covenantee but for the benefit of the purchasers from a common vendor who become entitled to enforce it. In the present case there will be no basis for the application of this principle, in as much as in certain leases now proposed to be granted it is intended a x not to impose the restrictive covenant. In the absence of such a restrictive covenant, no question can arise of a right in other Lessees to enforce it.

4. The present Lessees in Blocks 1 and 2 will not be entitled to restrain Government from authorising the user of other plots for commercial purposes because clause 6 of the Lease provides that the Lessor may alter the Building Rules and General Estate Regulations relating to other plots as the Lessor thinks fit and the Lessee shall have no right to require any enforcement thereof or any of them against the Lessor or any person claiming under Lessor

Sd/-
Advocate General. M.C. Setalvad
28/7/41.

U.R. to P.W.D., No. 6745, dt. 31/7/1941.

Office of the R.L.A.

As pointed out by the R.L.A. in paragraph 2 of his opinion No. 2170, dated the 11th March 1941, Government's rights under the lease are in no way affected by the equitable mortgage by the Deposit of title deeds with Mr. Khandwalla. The High Court in First Appeal No. 310 of 1939 against the decision of the Joint First Class Sub-Judge in suit No. 414 of 1926 has also held that M.. Khandwalla's equitable mortgage is valid subject to the rights reserved to Government under lease. It is therefore apparent that Government's right to forfeit th the lease for breach of the covenant is in no way affected by Mr. Khandwalla's mortgage. From the legal point of view therefore there is no reason to revise the orders of Government forfeiting the lease. The view taken by R.D. in para 1. at page 155 ante is correct.

2. The next question raised relates to the service of notice of forfeiture of the lease on the Eastern Mining Co. It appears from the Collector's letter at page 135 ante that possession of the premises has already been taken under clause 3 of Part IX of th mining lease in accordance with the orders contained in Government Memorandum (Revenue Department) No.P. 267-G, dated the 16th October 1940 i.e. presumably even before the R.L.A.'s opinion No. 2170 dated the 11th March 1941 was given advising Government to give notice also to the Eastern Mining Co. If so, since the possession has been already taken, the question of giving notice of forfeiture to the Eastern Mining Co. need not be pursued any further.

Sd/- P.N.M.
15/9

Remembrancer of Legal Affairs.
Sd/-
13-9-41

U.R. to R.D., No. 8188, dated the 17th September 1941.

No. 9044
Office of the
Remembrancer of Legal Affairs.

Bombay Castle, 17th October 1941.

From

P.N.Moos, Esquire, Bar-at-Law, I.C.S.,

Remembrancer of Legal Affairs.

To

The Commissioner of Excise,

Bombay.

Subject:- Liquor Warehouse, Jalgaon.
Repairs to-------

With reference to your letter No. 10-9/41 dated the 29th August 1941, on the above subject, I have the honour to observe as under:-

It appears that Government has leased a warehouse building at Jalgaon subject to the conditions mentioned in the accompaniments to Government Resolution (Revenue Department) No.5260/33, dated 24th November 1936. Condition ~~in~~ No. 15 provides that the repairs to all buildings as required from time to time should be carried out by lessors to the satisfaction of the Excise Commissioner and condition No. 18 lays down that in the case white washing repairing oiling and painting etc. is not done by the ~~the~~ lessors in time as directed by the Commissioner of Excise, these works should be done by the Excise Commissioner and the expenses incurred thereon should be deducted from the rent of the building. The Executive Engineer who has inspected the warehouse building considers that the following repairs are necessary to prevent deterioration of foundations etc.:-

(1) Buttresses are necessary to prevent the widening of cracks.

(2) Nalla training is required to keep it away from the building and thus prevent deterioration of foundation.

(3) Cement painting to masonry is necessary.

The lessors dispute their liability to carry out these works. The question for consideration is whether these works fall under conditions Nos. 15 and 18 of the lease.

Work No.1:- "To repair" means to make good defects including renewal where necessary (Inglis vs. Buttery 3 App. Ca. 552)i.e. "patching where patching is reasonably practicable, and where it is not, you must put a new piece"(per Lt. Blackburn at page 579, ibid see page 1719 of Stroud's Judicial Dictionary, 2nd Edn.). Whether repairs are necessary is a question of fact in each case to be decided with reference to the condition of the building. The Executive Engineer reports that buttresses are necessary to prevent the widening of cracks. The lessors seem to contend that the cracks are not likely to widen any further. If the opinion expressed by the Executive Engineer is correct the work No.1 would fall under condition No. 15 and the lessors would be liable to bear the expenses of providing buttresses.

Work No.2:- The Executive Engineer considers that the nalla training is necessary to prevent deterioration of foundation. The lessors contend that this defect is due to the bad use of the premises. The general principle for determining the tenants liability to "repair" simplicitor, is that "diminution in value, resulting from the natural operation of time and the elements, falls on the landlord, but the tenant must take care that the premises do not suffer more damage than the operation of these causes would effect; and he is bound by reasonable application of labour, to keep the house as nearly as possible in the same condition as when it was demised (per Tindal C.J. Gutteridge vs. Munyard, 1 Moor & R 336; 7C and P 129; see Stroud's Judicial Dictionary page 1719, 2nd Edn). If the training of the nalla in the present case is necessitated on account of natural causes

natural clauses and not by the bad use of the premises, the lessors would be liable to bear the expenses thereof.

Work No.3.:- The Executive Engineer considers that cement painting is necessary. If condition No. 13 is read with condition No. 14 it will be clear that "painting" relates to painting of iron and wooden structures. Obviously therefore cement painting to masonry would not be covered by these conditions. It is true that the word "repair" includes the renewal of the paint of a building which needs repainting (33 B.L.R. 280; Dredge v Conway James and Co. 1901, 2 K.B. 42). But in the present case cement painting to the masonry appears to be in the nature of a new work. Consequently the lessors cannot be required to carry it out.

I have the honour to be,

Sir,

Your most obedient servant,

Sd/- P.N.M.

16/10

Remembrancer of Legal Affairs.

Sd/-
11/10/41,.

Through

The Revenue Department.

P.S.M
25/4

R.I.No. 11271
5-12-1941.

Submitted.

Attention is invited to para. 1 of R.L.A.'s opinion No. 8275 dated 20-9-1940. In para. 2 of their Memo. dated 11-10-1940 Govt. directed the Collector to recover the difference in rent due from the Infant and Public Milk Supply Co., Ltd. and in case the Company declined to pay the amount, to compromise the matter and accept an amount equal to three year's arrears. The Company has accepted this offer; and the question now is of correcting the lease originally granted to the Company in 1917 so far as the terms in respect of 'area' and 'rent' are concerned. The D.G.P., Thana who was consulted by the Collector has advised that the corrections cannot be made in the original lease itself, but that a supplementary deed will have to be executed. The only question referred to the R.L.A. for consideration is whether the view expressed by the D.G.P., Thana is correct. (Please see para. 2 of R.D. office note dated 29-11-41 at p. 39 ante.).

2. The corrections required to be carried out are to change the description of the area of the land in the lease from "589 acres and 38 gunthas" to "630 acres and 27 gunthas" and to change the amount of the yearly rent payable by the lessee at the rate of eight annas per acre. These changes are not merely verbal but substantial. Consequently it would be desirable to embody the changes in a supplementary lease. The view expressed the D.G.P., Thana as

reported by the Collector in para. 1 of his letter dated 29-8-1941 at p.36 ante, appears to be correct.

Sd/-
6/12

A.S.

A document which varies the essential terms of an existing lease, such as the lease, such as the amount of rent, the time of payment thereof, and the consequences of default amounts to a fresh lease and it must be registered as a lease (Cf. Durgaprasadsing v. Rajendra Narain Singh, 41 Cal. 493; see Mulla's Registration Act, 1939 Edn. pp.76 77). A variation in respect of the area and the rent as in the present case, amounts to a variation of some of the essential terms of the existing lease, Consequently a registered lease providing for the variation of the terms of the existing lease in respect of the area and the rent would be necessary. The view expressed by the D.S.P. Thana is correct.

Sd/-
8/12

A.L.R.

Sd/-
12-12-41

R.L.A.

Sd/- P.N.M.
15/12

U.R. to R.D. No., 10919, dated the 18-12-1941.